88-1225

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

No.

HERBERT SCANDELL,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE NEW YORK STATE SUPREME COURT

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QUESTION PRESENTED

Herein the questions presented for review concerns whether the killing of two persons during an "extreme emotional disturbance", or blind homicidal rage involving no intent, motive, objective or conscious choice permits a consecutive sentence. Otherwise stated, the issue presented is whether a consecutive sentence imposed for two homicides committed during an extreme emotional disturbance or blind homicidal rage offends the double jeopardy clause of the Fifth Amendment of the United States Constitution and denies the appellant due process of and equal protection under the law.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE NEW YORK STATE SUPREME COURT

THE PARTIES

Herbert Scandell, the petitioner/appellant represented by McCORMACK, DAMIANI, LOWE & MELLION, 455 Route 304, Box 656, Bardonia, New York 10954. The respondent is the People of the State of New York represented by the Hon. Kenneth Gribetz, District Attorney of Rockland County, New York, 11 New Hempstead Road, New City, New York 10956.

CITATIONS:

Official and Unofficial reports of the opinoins of The New York State Court of Appeals and The Appellate Dívision of the Supreme Court, Second Judicial Department are: —NY2d —; —N.Y.S.2d—; and —AD2d—; and 532 N.Y.S.2d 404.

JURISDICTION:

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257, based upon the November 16, 1988 denial of a certificate permitting further appeal by the New York State Court of Appeals (Appendix B), from September 19, 1988 affirmance by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department of the judgment and sentence of the County Court of the State of New York imposed November 25, 1988, depriving the defendant/petitioner of rights derived from the United States Constitution.

CONSTITUTIONAL PROVISION:

This case involves an alleged depravation of the Fifth Amendment of the United States Constitution which states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Also, at issue is whether the defendant/appellant was denied due process and equal protection of law under the Fourteenth Amendment.

A STATEMENT OF THE CASE:

Pleas of guilty were entered by the defendant/petitioner to two counts of manslaughter in the First Degree on October 7, 1987. Consecutive indeterminate eight and one/third (8 1/3) year to twenty-five (25) year prison terms were imposed on November 25, 1987. (Appendix C-3). On September 19, 1988 the Appellate Division of the New York State Supreme Court for the Second Judicial Department affirmed the sentence. Thereafter, on November 16, 1988 the New York Court of Appeals declined to issue a certificate permitting further appeal. (Appendix B).

On February 13, 1987, the petitioner Herbert Scandell shot and killed his wife Melanie Scandell and her sister Wendy Beam. Subsequent medical examination conducted by defense and prosecution psychiatrists reveal that the homicidal event occurred during "an extreme emotional disturbance" or blind homicidal rage. Two noted forensic psychiatrists, Dr. Richard Weidenbacher of the Kings County New York Forensic Service examined on behalf of the defendant/petitioner and Dr. John Baer Train an eminently qualified forensic psychiatrist examined for the prosecution. Both

physicians findings were in accord. Based upon this fact pleas of guilty to two counts of manslaughter in the first degree reduced from murder in the second degree were entered.*

A pre-sentence hearing was conducted wherein both psychiatrists testified, as the issue in the case then became whether the defendant had perpetrated one act or two and whether a concurrent or consecutive punishment could be permitted. Throughout, the defendant/petitioner maintained that he had committed but one act and could only receive one concurrent term of imprisonment.

During the pre-sentence hearing, both psychiatrists described the non-medical but legal concept of an extreme emotional disturbance as a phenomenon involving no conscious rational choice or specific intent but rather a phenomenon involving a blind homicidal outburst of rage. (Appendix D5-7). For example, Dr. John Baer Train, the prosecution's psychiatrist, described an extreme emotional disturbance thusly:

> Q. If you would, I would like you to amplify your statements in that regard. You mentioned out of control going berserk.
>
> A. The individual is in a dissociative state, in which a part of his mind now splits off from his consciousness and takes over control of the individual. There is no judgment. There is no rationality. There is no thinking. There is no

*In the State of New York manslaughter in the first degree in violation of Penal Law § 125.20(2) involves the intentionally causing the death of another person under such circumstances where it is not constitute murder, in violation of § 125.25(1) because of an extreme emotional disturbance.

> thinking as to what he is doing. Should he do it, should he not do it. He is not open to consider all options of behavior, he is absolutely berserk. (Appendix D-7).

Dr. Train further described the extreme emotional disturbance suffered by the defendant/petitioner herein as one in which the defendant/petitioner was not able to reason, was suffering a blind unconscious outburst, and had no appreciation of his actions. (Appendix D-20). Dr. Richard Weidenbacher, testifying on behalf of the defendant/petitioner described an individual suffering an extreme emotional disturbance as being in a state of frenzy, having an incapacity to deliberate, plan rationally and, being uncapable of reasonable reflection. (Appendix D-24). Dr. Weidenbacher further described an individual suffering an extreme emotional disturbance as one not accessible to counsel or restraint, as an individual suffering one state of monopolistic frenzied emotion involving an absence of conscious choice, thought, reason or judgment. (Appendix D-27). Dr. Weidenbacher specifically stated that one experiencing extreme emotional disturbance has no opportunity for deliberation or reflection. (Appendix D-28).

In essence, the uncontraverted medical testimony at the pre-sentence hearing reveal that the defendant suffering extreme emotional disturbance had no criminal intent and had no purposeful objective of killing both individuals.

Both doctors characterized an extreme emotional disturbance and the defendant's actions as one non-separable event. Any separability in the facts events illustrative of any opportunity for conscious thought, choice of action or reflection, would have militated against the finding of an extreme emotional disturbance. (Appendix D-7, 27).

Mistakenly the court at trial term and the Appellate Division of the New York State Supreme Court focused on biological acts performed by the defendant and the multiple result produced. Certainly and without question, consecutive sentences have been authorized from events occurring in the same criminal transaction when successive acts have been performed with the requisite criminal intent. However, the courts below have failed to perceive and appreciate the nature of an extreme emotional disturbance as illustrated unquestionably in the record of the medical testimony proffered in the pre-sentence hearing. Simply put, while two biological acts might have been committed there was no separate criminal intent. There was one blind non-reasoning, non-judgmental, non-rational action. It was a failure of the courts below to appreciate that sentencing the defendant/petitioner to consecutive terms of imprisonment for actions involving no intent or knowledgeable appreciation offends the Fifth Amendment prohibition against double punishment for the same act or event. Herein perhaps one could argue that two biological actions occurred, however, clearly there was no criminal intent, purpose or objective in the performance of same.**

No proof was introduced showing that two acts were committed with two criminal intents. Because of same, consecutive sentences is not constitutionally permitted.

**Two spent shotgun shell casings were recovered. The defendant/petitioner argued that sufficient proof did not exist illustrating that the two homicidal wounds were inflicted by two separate discharges. On appeal, the Appellate Division of the Supreme Court of the Second Judicial Department acknowledged the issue, but held the circumstances supported a circumstantial inference of two separate homicidal discharges.

ISSUE PRESERVED:

Throughout the proceedings below, the entire issue was whether one act or two was committed mandating a concurrent as opposed to consecutive sentence. The pre-sentence hearing solely concerned whether one act or two was committed. Moreover, on appeal the defendant directly argued that the Fifth Amendment of the United States Constitution proscribed double punishment or consecutive sentences, citing *North Carolina v. Pearce,* 395 U.S. 711 23 L ed2 656 and the Fifth Amendment of the United States Constitution. Unfair and unequal treatment under the law was likewise argued below.

ARGUMENT

Certiorari should be granted herein as a conflict exists between the States of California and at least two of the Appellate Departments in the State of New York concerning how a single criminal act be determined. Moreover there is a conflict between appellate departments in the State of New York concerning this fundamental issue which the New York State Court of Appeals has refused to review. In *Neal v. California,* 55 Cal 2d 11, 357 P2 839, the Supreme Court of the State of California held that if multiple offenses were incident to one objective, the defendant may be punished for one of those offense solely as the determinative criteria should be the intent and objective of the actor. In the Fourth Judicial Appellate Department of the Supreme Court of the State of New York, a continuing criminal intent through a criminal transaction, or the objective or intent of the actor also found controlling. (*People v. Kelley,* 25 AD2d 715, 269 N.Y.S.2d 1012). Herein, the Appellate Division of the Second Judicial Department of the Supreme Court of the State of New York

followed the First Judicial Appellate Department of the State of New York in *People v. Baker,* 27 AD2d 269, 278 N.Y.S.2d 309 in determining whether two acts were committed, focusing on whether two acts were committed in sequence with criminal intent. It is fair to state that had the defendant/petitioner committed the same acts in the State of California or within the confines of the Fourth Judicial Appellate Department in the State of New York, a concurrent sentence would have been mandated herein. Based upon this conflict between the states cause exists for the court to grant certiorari to determine the issue presented.

Moreover, the issue presented should be decided by the court as the holding herein is in seeming conflict with some of the previous decisions of the court on like or similar issues.

Clearly, the Fifth Amendment prohibition against double jeopardy is binding upon the states and bars multiple punishments for the same offense. (*North Carolina v. Pearce,* 395 U.S. 711, 23 L ed 2d, 656, 665). If there is anything settled in the jurisprudence of England and America, it is that no man can be twice punished for the same offense . . . and there has never been any doubt of entire and complete protection of the party when a second punishment is proposed in the same court for the same facts for the same statutory offense . . .the Constitution having been designed as much to prevent the criminal from being twice punished for the same offense as being twice tried for it. (*Ex Parte* Lange, 18 Wall 163, 21 L ed 872, 876-878). The test to be applied is whether separate acts have been committed with the requisite criminal intent. (*Morgan v. Devine,* 237 U.S. 632, 650, 59 L 3d 1153). The double jeopardy clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. (*Brown v. Ohio,* 432 U.S. 161, 169, 53 L ed 2d 187).

If an indictment charges two offenses committed at the same time, and as part of a continuous criminal act inspired by the same criminal intent, they are susceptible of only one punishment. (21 American Jurisprudence Criminal Law Criminal Section 551). In a similar vein the court has decided that the transportation of two women at the same time interstate for the purposes of promotion of prostitution in violation of the Mann Act requires one sentence. (*Bell v. United States,* 349 U.S. 81; 99 L 3d. 905). Moreover, the wounding of two federal officers through the discharge of one shotgun shell has been held to be an act requiring one concurrent sentence. (*Ladner v. United States,* 358 U.S. 169; 3 L 3d. 2d 199).

In double homicide prosecutions, many jurisdictions have barred separate trials where a second person has been killed accidently by an accused volitionally attempting to kill another separate individual only, focusing on the design, intention or volition of the actor. (2 American Law Reports 606). (cf. 20 American Law Reports 341; 113 American Law Reports 222).

Herein a conflict exists between the states and the issue presented has been determined in diverse fashion. A fundamental unfairness exists where an individual can receive a different sentence for his actions dependent upon the geographical location of the commission of his crime within the territorial boundaries of the United States. Based on this fact, cause exists for the court to issue a Writ of Certiorari.

Additionally, the defendant/petitioner was denied due process and equal protection of the law below. We are aware of those decisions which hold that the equal protection clause does not compel uniform decisions by State Courts. (*Milwaukee Electric v. Wisconsin,* 252 U.S. 100, 105-106, 64 L ed

2d 476; *Beck v. California,* 369 U.S. 541, 554-555, 8 L ed 2d 98). However, herein, a uniform rule of law has been applied differently in diverse sections of the State of New York as well as in the State of California. Resultant of this application of different rules of law concerning the same issue, is the disturbing fact that in western New York and the State of California the defendant/petitioner would have received a concurrent sentence. Because a different rule of law is applied in southern and eastern New York, a consecutive term was imposed. Due process and equal protection calls for procedures in criminal trials which allow no invidious discrimination between persons, all people charged with crime must stand on an equality before the bar of justice in every American courtroom. (*Griffin vs. Illinois,* 351 U.S. 12, 17-18, 100 L ed 891). For this additional reason certiorari must be granted.

Respectfully Submitted,

McCORMACK, DAMIANI,
LOWE & MELLION,
Attorneys for Petitioner

JAMES H. MELLION
Counsel

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

2731j
Y/ep
Submitted - April 27, 1988

_____ AD2d _____

MILTON MOLLEN, P.J.
GUY J. MANGANO
WILLIAM C. THOMPSON
CHARLES B. LAWRENCE, JJ.

2366SE

The People, etc., respondent,
v. Herbert Scandell, appellant,
(Ind. No. 87/166)

DECISION & ORDER

McCormack, Damiani, Lowe & Mellion, Bardonia, N.Y. (James H. Mellion of counsel), for appellant.

Kenneth Gribetz, District Attorney, New City, N.Y. (John S. Edwards of counsel), for respondent.

Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Rockland County (Meehan, J.), imposed November 25, 1987, upon his conviction of manslaughter in the first degree (two counts), upon his plea of guilty, the sentence being two consecutive indeterminate terms of 8 1/3 to 25 years imprisonment.

ORDERED that the sentence is affirmed.

The defendant was charged in an indictment with the crimes of murder in the second degree (four counts), robbery in the first degree (three counts) and grand larceny in the fourth degree. These charges arose from the defendant's shooting of his wife, Melanie Scandell, and his sister-in-law, Wendy Beam. Both victims died as a result of the wounds suffered in this attack. Subsequent to the attack, the defendant stole a car at gunpoint from two Catholic nuns. Following negotiations, the defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to two counts of first degree manslaughter in full satisfaction of the indictment. The People indicated that the findings of two psychiatrists employed by the prosecution and the defense, respectively, to the effect that the defendant while not insane had committed the shootings while acting under an extreme emotional disturbance, compelled their acceptance of the defendant's plea to the lesser offenses.

On appeal the defendant contends that (1) the imposition of consecutive terms was illegal, and (2) the interest of justice warrants the imposition of concurrent terms in place of the consecutive terms so imposed. Contrary to the defendant's assertion, we conclude that the imposition of consecutive terms of imprisonment was not illegal. Although the two deaths may be said to have arisen from one incident involving a continuous course of action, the evidence adduced at a presentence hearing indicates that separate acts caused the deaths of the two victims and neither of these offenses was a material element of the other (*see*, Penal Law § 70.25[2]; *People v Truesdell*, 70 NY2d 809, 811; *People v Brathwaite*, 63 NY2d 839, *on remand* 106 AD2d 509). As the People correctly concede, if the evidence showed that the firing of a single shot

caused the deaths of both victims then the imposition of consecutive sentences would be unlawful (*see, People v Brathwaite, supra).* However, the record belies the defendant's claim that one shot may have caused both deaths. An FBI report submitted into evidence at the presentence hearing indicated that he thought he had fired two shots. Also recovered from the crime scene were numerous pieces of the broken stock of a shotgun strewn about the floor, indicating a violent fight. The autopsy reports of both victims indicated injuries consistent with having been beaten with the stock of the shotgun. Indeed, a contributing cause of Wendy Beam's death was found to be a skull fracture. This evidence supports a conclusion that there were separate acts making out separate crimes (*see, People v Di Lap,* 14 NY2d 170, 174, *rearg denied* 15 NY2d 678; *People v McMillan,* 61 AD2d 800).

Alternatively, the defendant argues that a single intent precipitated the offenses. Although we recognize that the Appellate Division, Fourth Department, will look to the motivating factor behind offenses to determine whether disparate acts are involved (*People v Kelley,* 25 AD2d 715; *see also, People v Murphy,* 115 AD2d 249, *lv denied* 67 NY2d 887), we decline to adopt this view. Rather, the test is whether separate acts were committed with the requisite criminal intent in determining whether consecutive sentences are appropriate (*see, People v Baker,* 27 AD2d 269, 272, *affd* 19 NY2d 982).

The sentence being lawful, modification thereof must rest upon the exercise of this court's interest of justice jurisdiction (*see,* CPL 470.15[6][b]). In mitigation of his crimes, the defendant points to the fact that he had no adult criminal record and was acting under extreme emotional disturbance when he committed the acts charged. Nevertheless, the crimes

of which the defendant stands convicted involved particularly vicious attacks and the defendant substantially reduced his sentencing exposure by entering a plea of guilty. Under the circumstances, the interest of justice does not warrant a reduction in the sentence imposed.

MOLLEN, P.J., MANGANO, THOMPSON and LAWRENCE, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

September 19, 1988

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, *Chief Judge*

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

HERBERT SCANDELL,

Appellant.

CERTIFICATE
DENYING
LEAVE

I, SOL WACHTLER, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, ° there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
November 16, 1988

SOL WACHTLER,
Chief Judge

°Description of Order: Sentence of County Court, Rockland County, imposed November 25, 1987; affirmed by order of Appellate Division, Second Department, dated September 19, 1988.

APPENDIX C

SENTENCING ORDER OF COUNTY COURT, ROCKLAND COUNTY, N.Y.

THE COURT: Thank you, Mr. Scandell.

In imposing a sentence on the charge of manslaughter in the first degree as reduced on the first and second counts of Indictment 87-166, in violation of Section 125.20, of the Penal Law, Class B violent felonies, I have received and read the presentence memorandum received from the probation department of Rockland County. The Court has also taken into consideration the nature of the crime for which you stand convicted, your condition at the time of the commission of the crime and all the surrounding circumstances.

It has also taken into consideration the reports of the two psychiatrists and a full blown hearing which was held here in this courtroom as to whether or not the sentence should be consecutive or concurrent.

I do want to make a few comments.

One, this was a brutal, savage murder. You took a shotgun and at point blank range shot your wife in the face. You then re-aimed and shot her sister Wendy at point blank range in the face with a shotgun. It is as brutal and savage a murder as I have personally been involved with in better than a quarter of a century as a defense attorney, as a district attorney of this county, and as a Judge.

In my lifetime, earlier in my lifetime, this is the type of case that they would have a death sentence for. We like to feel we're a more enlightened society in 1987 than we were in maybe 1947 when I graduated from high school. And we do look to psychiatry more.

In this case there was no dispute. Both psychiatrists, the one retained by Mr. Gribetz, one of the most reknowned psychiatrists in forensic psychiatry, Dr. John Baer Train said you were acting under extreme emotional disturbance. And Dr. Weidenbacher representing you also said the same. So that issue is foreclosed and properly so and as they say in an enlightened society. That means we don't talk about murder two any more. We talk about manslaughter one. That is what he pled to when he was before this Court. On the the 7th of October he pled guilty.

But what do I have here? Herbert Jr. is effectively an orphan. His father will be incarcerated throughout his formative years. His mother is gone forever. The two boys mother is gone forever. Tomorrow is Thanksgiving. How many in this room are going to have their children home for Thanksgiving? I have four daughters. One will not be home from Australia and not the one from California, but the one from Albany and the one from Goshen will be home for Thanksgiving and three of my daughters then will be home three weeks from now for Christmas.

Melanie and Wendy will not be home tomorrow or on Christmas or ever again. So I don't care what you didn't do prior to this. If you can become so enraged under extreme emotional disturbance that you would effectively destroy the lives of Melanie and of Wendy and effectively destroy the lives of their brothers, of their mother and their children, that's what I am taking into consideration. Would you do it again? Would there be extreme emotional disturbance again? I am distinguishing between murder and manslaughter. I have before me manslaughter convictions.

In Brooklyn on Palm Sunday several years ago 10 people were killed, shot. They called it the Palm Sunday massacre. In that case one psychiatrist said it was extreme emotional disturbance and one did not. And they had a full fleged trial. The jury found them guilty of manslaughter. The Judge's sentence in that case was 87 to 250 years, 10 consecutive sentences.

Psychiatry, which is an important part of our law in 1987, says you acted under extreme emotional disturbance when you killed Melanie Scandell and you acted under extreme emotional disturbance when you killed Wendy Beam with a second shot.

Keeping all these things in mind, upon your conviction under the first count of the Indictment manslaughter in the first degree in violation of Section 125.20 of the Penal Law, a Class B violent felony in the death of Melanie Scandell, it is the judgment of the Court that you be sentenced to an indeterminate sentence of imprisonment, the maximum of which shall be 25 years and the minimum of which shall be 8 and one-third years.

As to the second count of the indictment, manslaughter in the first degree in violation of Section 125.20 of the Penal Law, a Class B violent felony involving the death of Wendy Beam, it is the judgment of the Court that you be sentenced to an indeterminate sentence of imprisonment the maximum term of which shall be 25 years and the minimum term of which shall be 8 and one-third years.

You want to get on with the rest of your life? I want to protect society. Therefore, these sentences will run consecutively. They are acts of killing one young girl and then turning and killing another. Psychiatrists say it is extreme emotional disturbance, so be it, but it is two separate and distinct acts and the brutality of this cries out for the maximum term and it will be consecutive.

You are, therefore, committed to the New York State Department of Correctional Services for a total term of 16 and two-thirds years to 50 years. You will be given credit for any time to which you are legally entitled.

You are remanded to the Sheriff of Rockland County for delivery to the State Department of Correctional Services. Would you advise the defendant of his right to appeal.

THE CLERK: Penalty assessment?

THE COURT: One hundred dollars.

MR. DAMIANI: Could I ask that it be waived in view of the length of sentence? I don't know if they get paid anything in prison any more. I assume in view of the length of your honor's sentence—

THE COURT: All right. I will waive it.

THE CLERK: Herbert Scandell, you have been convicted after a plea of guilty and you have been sentenced.

You are entitled to know what your rights are with respect to an appeal from this judgment of conviction.

In the event you wish to appeal, these are your rights.

You have a right to appeal to the Appellate Division, Second Department, within 30 days, and in addition, upon proof of your financial inability to retain an attorney and to pay the cost and expenses of the appeal, you have the right to apply to the Appellate Division, Second Department, for the assignment of an attorney and for leave to prosecute the appeal as a poor person and to dispense with printing.

The Appellate Division, Second Department, is located at 45 Monroe Place, Brooklyn, New York 11201.

You are being handed a copy of the notice I just read to you.

THE COURT: Defendant remanded.

I HEREBY CERTIFY THAT THIS IS
A TRUE AND ACCURATE TRANSCRIPT
OF THE WITHIN PROCEEDINGS.

Roslyn Goldstein, Official Reporter.

APPENDIX D

COUNTY COURT: COUNTY OF ROCKLAND
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HERBERT SCANDELL,

Defendant.

Indictment No.
87-166

PRESENTENCE HEARING

Rockland County Courthouse
New City, New York
November 10, 1987

B E F O R E : Hon. ROBERT R. MEEHAN,
County Court Judge

A P P E A R A N C E S :

HON. KENNETH GRIBETZ, District Attorney
For the People
New City, New York

MC CORMACK, DAMIANI, LOWE & MELLION, ESQUIRES
For the Defendant
Bardonia, New York
BY: JAMES MELLION, Esquire of Counsel
(Also present: Gerard Damiani, Esquire of Counsel)

Defendant present in person

Roslyn Goldstein
Sr. Court Reporter

JOHN BAER TRAIN, having been called as a witness on behalf of the Defendant, was duly sworn by the Clerk of the Court, took the stand, was examined and testified as follows:

THE CLERK: Would you state your full name and business address for us please, spell your last name?

THE WITNESS: John Baer Train. T-R-A-I-N, 1 Washington Square, Larchmont, New York.

THE COURT: You may inquire, Mr. Mellion.

DIRECT EXAMINATION BY MR. MELLION:

Q Sir, please state your occupation for the record?

A I am a psychiatrist.

Q And how long have you been engaged in that field?

A Yes.

Q How long have you been practicing psychiatry Dr. Train?

A Well, I started my training in psychiatry in 1940.

MR. GRIBETZ: For the record we'll stipulate to his expertise.

THE COURT: For the purpose of this hearing and we have no jury here, I know his expertise. He has been before me many times. He's well recognized.

MR. MELLION: If I could for the Appellate Division I would like to identify who we're dealing with.

THE COURT: We're dealing with John Baer Train who has testified in this Court many times and throughout the State and it is only for the Court's assistance in a sentence that he is here. I think the Appellate Division probably knows him better than I do.

Q Doctor, are you familiar with the legal defense of extreme emotional disturbance?

A Yes, sir.

Q Have you had occasion to examine concerning the presence of that particular phenomenon in criminal cases?

A Yes, sir.

Q How many different times, Doctor, would you say you have had occasion to examine on the issue of extreme emotional disturbance?

A Oh, somewhere close to 50 times.

Q And has your testimony been received as an expert witness?

A Yes, sir.

Q On the issue?

A Yes, sir.

Q Now is the concept of extreme emotional disturbance, Doctor, a legal concept or medical concept?

A That's a legal term. That's a legal concept.

Q Would you, Doctor, if you could explain for us in layman's terms what you understand this phenomenon to be?

A In applying our psychiatric expertise we classify that under diagnosis of an adjustment reaction. Extreme adjustment reaction in which an individual is relatively normal without any obvious psychiatric disorder or mental disorder under an unusual extreme stress.

By that kind of stress we mean where there can be the sudden accidental death of a loved one. It can be extreme stress of a divorce situation, an individual who finds it difficult to be alone. It can be extreme stress of seeing a child being maimed or killed. It is a stress that is beyond the everyday experience of ordinary daily life of everyday life. It is the kind of stress that would affect everybody severely.

Q Previously you described it as catastrophic stress?

A Catastrophy only occurs in a group. It is a stress of people seeing their loved ones die in an earthquake or a fire. We call that catastrophe, meaning it is an accident or some threat that involves many people.

Q What you are talking about is an extreme form of stress?

A Extreme stress is something more than. We classify stress as minimal, mild, moderate, severe and extreme. When this individual is exposed to extreme stress he now enters into

a state of mind that is really dissociative. Parts of his mind slake off and usually what occurs is that there is an underlying anger, rage that's unconscious, submerged in his mind. It's been simmering there for quite awhile and then suddenly a stress occurs and all this rage bursts forth in an uncontrolled, blind, unconscious, impulsive behavior. Usually it is very violent and usually homicidal.

Q Doctor, you mentioned a couple of things I'd like to explore. You mentioned the stress. I would take it in all cases where you recognize an extreme emotional disturbance you found an extreme stress?

A Yes.

Q And would you primarily focus on the information prior to the homicidal act to determine whether or not the individual was suffering an extreme stress?

A You do. Because in essence the amount of emotional excitement is not immediate to the particular situation. There has been something building up over a period of time. It is sort of simmering in the unconscious and then the situation, the extreme stress occurs and everything that's been built up explodes.

Now the other factor is when you have this extreme emotional reaction in which the individual is out of control there is this rage expressed totally as impulse. It is blind and unconscious. He's really berserk.

Q That's the second factor I was coming to the act itself. And now we're talking about characteristics of the homicidal act during extreme emotional disturbance; is that correct?

A Yes.

Q And if you would, I would like you to amplify your statements in that regard. You mentioned out of control, going berserk?

A This individual is in a dissociative state in which a part of his mind now splits off from his consciousness and takes over control of the individual. There is no judgment. There is no rationality. There is no thinking. There is no thinking as to what he is doing; should he do it, should he not be doing it. He's not open to considering all options of behavior. He's absolutely berserk.

Q Is there a continuity to his actions?

A I am not sure what you are asking.

Q If you were looking at the facts of a particular case, Doctor, able to discern a lack of continuity in the action. The individual stopping and reacting to impulse perhaps and then starting action again, would that be consistent with an emotional disturbance or not consistent?

A That would tend not to be consistent, but it is the same second continuation as of the same irrational outburst until the amount of energy is diminished because a lot has been spent in this violent behavior.

Q Would you properly term it, Doctor, one continuous violent action?

A Yes.

Q Is there a non-separability to it?

MR. GRIBETZ: Objection. From the biological or in psychological terms?

MR. MELLION: If the Doctor can answer the question.

THE COURT: No. Can you answer it separable or you want something further? I know you hesitated.

THE WITNESS: I hesitate because I believe what it is from a psychological point of view it is one mental reaction. It is one mental state.

Q One non-separable event, one episode?

A His mental state is the same. It continues all the way through. That's all as a psychiatrist I can say that his mental state at that time.

Q And Doctor, you also mentioned I believe characterization that you have discerned in these cases after the act terminates?

A As a general rule the act continues until all the energy is spent at which point the person is emotionally exhausted. It is called apathetic. It is where an individual would be apathetic at the time, regrets that it is done, great remorse of the realization of it, feels very guilty. He's depressed and totally preoccupied with what has happened.

Q So what you have described, Doctor, is this one violent episode until all energy is spent?

A In this particular case?

Q I haven't asked you that. I am talking about the phenomenon in general?

A In general, yes.

Q Now, Doctor, you have had occasion to examine our client Herbert Scandell in this particular case, did you not?

A Yes.

Q And that was sometime in August, I believe at the Rockland County jail?

A Yes, August 12th.

Q And I believe I was present?

A Yes.

Q Mr. Scandell was present and the interview took approximately 4 hours?

A Yes.

Q And did you, Doctor, with a reasonable degree of medical and psychiatric certainty form an opinion after that interview relative to the existence of the extreme emotional disturbance defense in this particular case?

A Yes.

Q And what was that opinion, Doctor?

MR. GRIBETZ: I would stipulate for the purpose of this hearing that the whole report could go into evidence.

THE COURT: One thing I want to ask. Is that the report right there?

THE WITNESS: It is a copy of it.

THE COURT: One thing, having read other reports I was impressed with the forensic opinion at the time of the instant offense. Man was in a state of extreme emotional disturbance. It is like in the paragraph forensic opinion, but it almost seems like it is a fact or is it an opinion?

THE WITNESS: It is an opinion.

Q And Doctor, that was an opinion reached with a reasonable degree of medical psychiatric certainty; is that correct?

A Yes.

MR. MELLION: I don't believe I have any further questions.

THE COURT: Mr. Gribetz?

MR. GRIBETZ: Thank you.

CROSS-EXAMINATION BY MR. GRIBETZ:

Q Doctor, is it correct that you are able to render an opinion concerning the state of mind that a person was in this particular incident and the time dealing with the death of two individuals that you have expressed that opinion?

A Yes.

Q Would you be able to know from a biological standard what exactly transpired in the room at the time that Wendy Beam and Melanie Scandell were murdered?

MR. MELLION: Objection.

THE COURT: Overruled.

A When you say biological?

Q Would you know whether a single act took place or several acts took place which led to the death of these two people?

MR. MELLION: That treatise is the ultimate conclusion to be drawn by the Court.

THE COURT: No. Overruled. I will take it.

A Well, I think the behavior included behavior varied from time to time. One might say from a behavirious point of view they were separate acts, but it is all under one mental state.

Q Now, as far as separate acts, isn't it correct that you reviewed during the course of your preparation for your report that you filed with the Court concerning the mental state of the defendant, that you read the autopsy report of Dr. Frederick Zugibe?

A Yes.

Q And were you aware that it was the conclusion of Dr. Zugibe that the deceased Melanie Scandell suffered massive brain head injuries due to shotgun wounds?

A Yes.

Q And were you also aware that Dr. Louis Roe indicated in his autopsy report dealing with the death of Wendy Beam that Wendy Beam suffered gunshot wounds of the face, neck and chest and a fracture of her skull as well as bronchial pneumonia?

A I was not aware until just recently about her fractured skull and bronchial pneumonia.

Q The bronchial pneumonia would be after impact?

A Yes.

Q When we deal with the issues of an act have you ever testified in such a hearing? Let me restate the question. Doctor, have you ever testified in a proceeding as to whether a defendant's single act or numerous acts took place?

A Honestly, no.

Q Neither have I.

THE COURT: That takes in all of us.

Q Now, Doctor from a biological standard would you agree with me the shooting of a shotgun at one individual would be considered an act that that person performed; is that correct?

MR. MELLION: Again that is the very ultimate fact of contraversy.

THE COURT: No, no. I am looking for assistance here in sentencing him. So I am going to allow certain leeway, far more than I ever would have allowed in a trial of this matter. Overruled.

Q Is it correct that a shotgun blast at the head of Melanie Scandell would be considered an act?

A That's an act.

Q Would it also be correct that the shooting of a shotgun and discharging of a shotgun at Wendy Beam is also considered an act; is that correct?

A From pure element of behavior I would say it is an act.

Q Would it be correct that the battering of a skull, hitting of a skull of a human being would also be considered an act?

A Yes.

Q Would it also be correct that a loading of a shotgun would be considered an act?

A Yes.

Q And would it be correct also that the chambering of a shotgun, pumping of a shotgun would also be considered an act?

A Yes.

Q Is it correct that prior to the commencement of the proceeding today I had Sgt. Wohl of the Haverstraw Police Department show you how this particular shotgun was operated?

MR. GRIBETZ: And when I say shotgun for the record I wish to offer at this particular time into evidence a shotgun that was recovered from the person of the defendant as evidence, as People's exhibit number 5 in evidence.

THE COURT: That was the shotgun that was found in the car in Jersey?

MR. GRIBETZ: That's correct.

THE COURT: Mr. Mellion?

MR. MELLION: No objection, your honor.

THE COURT: There being no objection it will be marked in evidence as People's 5.

(Shotgun was received directly into evidence and marked as People's exhibit 5, in evidence).

MR. GRIBETZ: I am going to withdraw the last question.

Q Doctor, is it correct that you saw Sgt. Chris Wohl of the Town of Haverstraw police demonstrate the operation of this weapon which constitutes People's exhibit 5 in evidence?

A Yes.

Q Is it correct to fire this particular weapon one must pump the shotgun and then pull the trigger?

A Yes.

Q Would you agree with me the pump action the pumping action of this shotgun is a physical act?

A It's a physical act.

Q Would you agree with me, Doctor, as you saw Sgt. Wohl fire the weapon that to fire the weapon it must again be pumped this particular shotgun?

A Yes.

Q Would that be a physical act?

A Yes.

Q And lastly, would it be correct that the pulling of the trigger on that shotgun would also be considered a physical act?

A Yes.

Q And would it be correct to say that if one were to hit somebody over the head with a shotgun or physical object one time or numerous times each time that that act was committed that is a physical act?

A Yes, it is.

Q Would it be correct, Doctor, that during one frame of mind, one period of time where one suffers from extreme emotional disturbance that an individual during that period of time could commit dozens of physical biological acts?

A He can do dozens of physical acts in carrying out a mental state.

Q During the course of one mental state?

A Yes.

Q That one state would be extreme emotional disturbance?

A Yes.

Q But an individual during that period of time could commit several numerous biological acts?

A Yes.

Q If I were to give you an example, a hypothetical question that I would like to pose to you.

If a person came home to his house, found his wife in bed with somebody else and was extremely emotionally disturbed and his wife ran in one direction and the man ran in the other direction and he proceeded to shoot both of these people in separate locations, would this be one act or two biological acts that were being committed?

A Well, it is two physical acts under the same mental state.

Q And we would assume for instance that in this hypothetical that the person did suffer from extreme emotional disturbance?

A Yes.

Q He proceeded to shoot one person in the living room and another person in an adjacent room or even in the bed?

A Yes.

Q These would be two physical acts that were taking place?

A Yes.

Q And would it also be right a psychiatrist could only testify as to mental state; is that correct?

A That's what we should do.

MR. GRIBETZ: I have no further questions.

REDIRECT EXAMINATION BY MR. MELLION:

Q Mr. Gribetz' example of the fellow who comes home and finds his wife in bed with another, focusing on that example, Doctor. If the individual shoots his wife in the bedroom and empties the gun. The man flees. He reloads the gun. He pursues the man outside the house and finds him. That very well might be a murder homicide offense because it shows the ability to think, react, consciousness of choice and so forth, would it not?

A Yes.

Q If both individuals were shot immediately in the spur of the moment operating under one mental state it very well is, dependent upon the other circumstances in the case, being extreme emotional disturbance?

A Yes.

Q And what distinguishes the two is the operation of the mind, is it not?

A Yes.

Q The ability to think and reason?

A Yes.

Q And that's the basic distinction?

A Yes.

Q Now, all the examples that Mr. Gribetz cited in your cross-examination those were deeds performed under one mental state?

A Yes, I said that.

Q And they might very well be automatic robot like actions, all performed in one mental state?

A Well, I called it a dissociative state, yes.

Q There is no appreciation by the actor in that state is there of the actions?

A No, there is no appreciation.

Q No knowing appreciation by the actor?

A That's right.

MR. MELLION: That you, Doctor.

RECROSS-EXAMINATION BY MR. GRIBETZ:

Q Again there is no knowing of appreciation would it be correct though these are separate biological acts that are being performed?

A These are separate acts, yes.

Q And even the analogy that Mr. Mellion gave you about the lover running outside the house and wife being killed inside the house, is it conceivable that during the period of time that both these acts were being conducted that the person suffered from extreme emotional disturbance?

A Second one would be a question.

Q But is it conceivable? It could happen under certain circumstances.

Q That a person could suffer from extreme emotional disturbance, kill one person inside a home, find somebody in that exterior portion of the home and kill that individual and during both periods of time he would be suffering from extreme emotional difficulties disturbance?

A Could be.

MR. GRIBETZ: Thank you.

THE COURT: Are you through Mr. Gribetz?

MR. GRIBETZ: Yes, your honor.

THE COURT: Do you have any redirect, Mr. Mellion?

MR. MELLION: I do, Judge.

FURTHER REDIRECT EXAMINATION BY
MR. MELLION:

Q The key factor though, Doctor, is appreciation of the acts; is that correct?

MR. GRIBETZ: Objection to key factor, your honor.

Q The difference between murder and extreme emotional disturbance manslaughter in this sense is appreciation of the acts, isn't that true?

A That's important, yes.

Q And in this particular case the diagnosis was extreme emotional disturbance?

A Yes. In this particular case I believe that all the different acts occurred under the same mental state, one mental state of extreme emotional disturbance at which point this man was not able to reason. He was behaving in a blind unconscious outburst.

Q Not able to reason or appreciate his actions?

A That would be the equivalent.

MR. MELLION: Thank you, Doctor.

THE COURT: Anything further?

MR. GRIBETZ: No, your honor. Thank you very much.

THE COURT: I would like to ask a couple of questions.

You have been called upon to examine people for this extreme emotional disturbance many times. Have you also had occasion where you found people were incompetent to understand they were temporarily insane at the time of the act and not responsible at all?

In other words the insanity defense as was used in the case of John Hinckley he was held to be insane and, therefore, not competent for his actions and he was sent to a hospital in Washington. Have you ever been called upon to make that type of determination?

THE WITNESS: We don't in New York State.

THE COURT: We don't have the rules. I know they are different rules.

THE WITNESS: He can be psychotic enough to commit a crime without being able to appreciate the crime.

THE COURT: He could be held not guilty?

THE WITNESS: He could be held not guilty.

THE COURT: In New York State. What I am getting at, you can do a psychiatric evaluation whether you ever have done one or other doctors where it was held that the person was not competent, did not know what he was doing?

THE WITNESS: That's right.

THE COURT: And, therefore, he was not guilty of any crime, he gets Mid-Hudson?

THE WITNESS: I have done that many times.

THE COURT: Now this is the question. Then based on that, was there any limitation on your examination when you examined Herbert Scandell? In your examination, August of '87, on August 12th of '87 was there any limitation on what your finding could be? You could find him totally competent and not under stress and not to be emotionally disturbed but you did find emotional disturbance. Could you have also found him to be insane and not responsible for his actions at all?

THE WITNESS: No.

THE COURT: Well could you have? I know you didn't, but were you told to find him either competent or under extreme emotional state of disturbance? Were you given then the third, insane?

THE WITNESS: I wouldn't have found him insane.

THE COURT: You missed my point. Was there any limitation on your evaluation?

THE WITNESS: No.

THE COURT: You could have if you found the person insane?

THE WITNESS: If I found it.

THE COURT: That's important to me. If he was found to be insane by the Doctor he wouldn't be responsible at all. He wouldn't be charged with manslaughter. You do understand when a person is charged with murder by finding him to have acted under extreme emotional disturbance it does not exonerate him from criminal liability. It reduces it to manslaughter. If you find him temporarily insane it exonerates him from all deliberate acts?

THE WITNESS: No limitation was placed when I was retained by the district attorney's office.

THE COURT: What you found was he acted under extreme emotional disturbance and there was one mental state, two acts and one mental state, that being the mental state that reduces it from murder to manslaughter?

THE WITNESS: Yes.

THE COURT: Thank you, Doctor. Thank you very much. You are excused.

RICHARD WEIDENBACHER, having been called as a witness on behalf of the Defendant, was duly sworn by the Clerk of the Court, took the stand, was examined and testified as follows:

THE CLERK: Would you state your full name and address and spell your last name?

THE WITNESS: Richard Weidenbacher, Jackson Heights, Queens County, City of New York.

THE COURT: You may inquire.

DIRECT EXAMINATION BY MR. MELLION:

Q Please state your occupation, sir?

A Well, I am a physician and I have been a psychiatrist for 20 years and for the past 14 years I have specialized in forensic or Court psychiatry.

MR. GRIBETZ: We would stipulate to the credentials and expertise of the witness.

THE COURT: Fine.

Q Doctor, currently where are you employed?

A I am a member of the forensic or Court psychiatric staff at Down State Medical Center in Brooklyn and my work there is salaried and I'm actually employed by the New York State, City Health and Hospital Corporation.

Q Do you also practice forensic psychiatry?

A I practice on a private basis. On that capacity I am here today.

Q In the course of your public and private employment have you had occasion to examine for the legal defense of extreme emotional disturbance applicable to murder cases?

A Yes, many times.

Q Doctor,

THE COURT: Approximately how many times?

THE WITNESS: In matters of extreme emotional disturbance, oh, I would estimate roughly one hundred times. Something in that order.

Q And Doctor, extreme emotional disturbance is a legal phenomenon is it not?

A It is a legal concept. I should say it is not a recognized term in so far as psychiatric or medical nomenclature. It does not appear, for example in the commendia of diagnostic terms issued by the American Psychiatric Association.

Q Doctor, would you as best as you can describe for the Court what you understand extreme emotional disturbance to be?

A Well, I understand it could be a state of frenzy of suspension, of incapacity to reflect deliberate, to plan rationally. A state in which one is borne really pell mell on a crest of a wave of emotion as opposed to being borne on a rational argument and cogitation of thoughts. It is a state of normally

quite transitory during which a person proceeds in some respects in an almost automated fashion. Certainly in a fashion in which he or she seems incapable of reflection, seems inaccessible to reason or to counsel.

Q Now Doctor, in examining on the issue of extreme emotional disturbance do you look at the person's life and the facts prior to the homicidal act?

A Surely.

Q And prior to the act itself what kind of factors or indicators do you look for in particular?

MR. GRIBETZ: Objection.

THE COURT: I will take this. Overruled.

Q Just briefly Doctor if you would?

A In most instances in my experience of conduct which seems by concensus referrable to extreme emotional disturbance, the prepetrator was not beforehand known to be irritable or histrionic or violent or dramatic or unstable. Most classic instances I think again if we consider the consensus are instances in which a person normally is stable and perhaps not quiescent but controlled for certain reasons which may be cummulative, is brought to a point in which their normal composition or normal composure and tranquility is shattered.

If one considers a person who is one of histrionics or hysterical make-up from the start and one considers whether such a person might be affected by extreme emotional disturbance, one might proceed with caution and consider one

might be dealing rather with exacerbation and another instance of violence on the part of the person whose character is of that nature to begin with.

Q Do you try to determine what stress the individual was under or what stressor triggered the event?

A The term stressors is really a recent devised term. But what factors do cause stress and what the nature of stress is in common sense would say that in trying to assess a state of mind of a person who may have been and is extremely emotional disturbed one should and may consider what factors which might have led to that state and tried to document the existence in that case of the state too.

Q Doctor, I'd like to move on to part two of the diagnosis as it has been broken down. What factors or indicators pertinent to the homicidal event itself do you look for, when you are examining for the presence of extreme emotional disturbance?

A Apart from the homicidal act you say?

Q Yes. During the transaction where the death occurs what factors or indicators do you look for when testing for the presence of this phenomenon?

A You want as best you can to learn what the relationship is between the assailant and the victim or victims had been beforehand and precisely if possible to learn what relationship and whatever there was and what words may have been exchanged, what actions may have been taken by the victim and assailant just prior to the denouement in the fatal homicide.

Q As best you can, Doctor, would you describe for us how an individual acts during the homicidal event?

A If that person be indeed by extreme emotional disturbance?

Q Yes?

A A person is frenzied or berserk. The person if they are observed they are normally described as beside himself or herself. If you consider the possibility of a female besides himself or herself and acting in an uncontrollable fashion, inaccessible to influence, virtually certainly inaccessible to counsel or restraint. Acting inprudentially, senselessly.

Q Would this state, Doctor be characterized by one mental state of the actor?

A Would this state be one mental state?

Q Yes?

A It's thought of as an enveloping monopolizing state of frenzy which when spent is exhausted and terminates pretty much spontaneously in most instances. And what may occur during that state various phenomena occur during that state. But it is one mental condition. It is one disabling condition I would say. I would say it is a state of suspended rationality and accessibility. One state of monopolistic frenzied emotion. Hence the term disturbed as well as emotional.

Q Would it be characterized, Doctor, by the absence of conscious choice or thought or reason, exercise of reason or judgment?

A Yes.

Q Therefore, when examining for the presence of extreme emotional disturbance it would become important to determine the presence or absence of independent thoughtful action would it not?

A Yes. Any clear indication of deliberation or reflection and consideration of alternative courses and the likely upshot or aftermath of the conduct in which the person was embarking would act contrary to effection by extreme emotional disturbance I should say.

And I think I am not the only one who would say this who argue against that. Because it is again comparable in effect to a person being borne on a crest of a great wave. A person is not really autonomous in the truly correct sense. Best sense of the word autonomous while it is affected by extreme emotional disturbance, there is some superficial sense of being autonomous but they are really carried, they are swept physically. Metaphore is good as an accepted scientific term to describe this state as I perceive I have of it and it is generally perceived.

Q Would the examiner, Doctor, draw a distinction between a simple deed or a series of deeds performed under this one emotional state as you described it in diverse purposeful actions?

MR. GRIBETZ: Objection, your honor.

THE COURT: Overruled. Do you understand the question?

A I believe I do. I cannot, I would not, I cannot readily envisage if one imagines between emotional disturbance truly diverse and purposeful conduct. Within that rubrick there may be more than one action but if by acts one means a chosen considered course, which is one way to think of that term, then various acts are not part of the phenomenon of extreme emotional disturbance. But become somewhat semantic there may be different actions. But if the act be a chosen course, again you don't think of diverse acts as occurring by a person affected by extreme emotional disturbance. I don't think of it that way.

Q So what you are saying there is a continuum non-separability to the act?

MR. GRIBETZ: Objection.

THE COURT: He's your witness.

MR. GRIBETZ: That's not what he said.

Q Doctor, you had occasion to examine our client Herbert Scandell did you not?

A Yes, on two occasions.

Q Did you have occasion, Doctor, to examine various materials before or after or during the examination of Mr. Scandell?

A Both prior and subsequent to the examination I reviewed a number of sorts of material.

Q As best you can, can you tell us the type of things you remember you viewed?

A Prior to the first examination, which was on April 3rd of this year, I had seen I think only photocopies of newspaper articles, for what they are worth. But subsequent to that first examination interview and certainly prior to the second interview which occurred on September 4th of this year, I examined also the resume of his statement made to a Police Officer which is entitled sum and substance, a transcript of his interrogationary statement to assistant district attorney Edwards. I have also examined other material not relating specifically to him but rather to the psychiatric history of his wife. I am not sure.

Q I don't think at this point that's necessary. But these are the type of things that you examined and after reviewing the diverse documents and after examining Mr. Scandell you reached a diagnosis; is that correct?

A Yes. I was satisfied from the first interview with him that for sure there were numerous data argued in my mind at that point that he had been beset by a state of extreme emotional disturbance at the time of the homicides.

Q And is that opinion formed, Doctor, with a reasonable degree of medical and scientific certainty?

A Yes, it is.

Q And Doctor, focusing on the particular acts during the homicidal events in this case are you satisfied, Doctor, these are characteristic of the phenomenon you described previously of extreme emotional disturbance?

A Yes. There is really no doubt in my mind that that term is applicable is here. Everything we know about what hap-

pened, everything he has said to me argues I think very clearly that he was beset by extreme emotional disturbance just prior to the disaster of February 13th.

MR. MELLION: Thank you, Doctor.

THE COURT: Mr. Gribetz, you may inquire.

CROSS-EXAMINATION BY MR. GRIBETZ:

Q Is it correct, Doctor, that the defendant did not suffer from mental disease or defect as defined in the Penal Law of this State? He did not as a result of mental disease or defect lack substantial capacity to know or appreciate either the nature and consequences of his conduct or that such conduct was wrong?

A That's correct.

Q He knew the nature and consequences of his conduct and he knew that in fact it was wrong?

A Not quite. He did not lack capacity to understand those things, counselor. It is a good question whether at the time he really took it in. In fact I think he did not, but I would have to say there is no good reason to believe that he lacked substantial capacity to know or appreciate the nature and consequences.

THE COURT: When you did your examination you had a right, there were several things you could have done: Totally competent, under extreme emotional disturbance or as Mr. Gribetz asked, you found extreme emotional disturbance in this case?

THE WITNESS: I did.

Q Did you see the autopsy report of Doctor Frederick Zugibe? Was that given to you by Mr. Mellion and Mr. Damiani?

A I don't believe it was, counselor. I have to refresh my memory.

Q By all means?

A No, I have not seen.

Q And you are aware are you not that Melanie Scandell died of massive brain and head injuries due to shotgun wound?

A This is my clear understanding.

Q Were you shown the autopsy report prepared by Doctor Louis Roe by Mr. Damiani or Mr. Mellion?

A I did not see that report, no.

Q Were you aware that Wendy Beam died of a somewhat different cause of death? That is a relevant shotgun wound to face, neck and chest as well as a fracture of the skull?

A Well, my understanding was that she died really of the aftermath of those, her induced wounds.

Q Which would be the pneumonia that set in?

A Yes.

Q Would it be correct that you did speak to Mr. Scandell concerning what transpired during this period of time?

A You mean at the time?

Q At the time of the tragedy?

A Yes. I had not only notice of what he has told other persons but I myself questioned him.

Q How did he explain how he killed Wendy Beam and Melanie Scandell?

A I can tell you what exactly he told me in that connection. He told me that he himself quote was on the other phone and end of quote in his parents home when Melanie and Wendy entered. To quote him again, I saw them. I went upstairs. So I started talking. I asked Melanie, where is our son? And she didn't say nothing. So I asked her again, where is our son? She said, don't worry. You'll never see your son again. You'll never see your son again. I started getting a little mad. Melanie, where is our son staying? Don't worry, you'll never see your son again.

I grabbed the shotgun and I pushed her. And at this point he indicated to me he had taken the weapon with either hand and used it somewhat in the manner of a bar. After that she was something, something. I can't remember. After that everything was like I don't remember. I just know things started. I asked him, counselor, I asked Mr. Scandell did he remember firing a shotgun at Melanie and Wendy? His answer was, I think a different gun. Everything was like so fast. And he told me that there had been a number of weapons in the room. I asked him if he recalled loading a weapon on

February 13th. He said, no. He did tell me quote, he remembers his mother screaming and yelling and hollering and he remembers quote he ran out of the house. And obstensibly, counselor, he has no recollection of the crucial details of the homicidal assault.

Q He tells you he has no recollection?

A That's right.

Q And you are telling us based only on what he told you?

A Correct.

Q And it is correct that he admitted the physical act of grabbing the shotgun and he does remember that?

A He remembers grabbing a shotgun and pushing her with it.

Q And is it correct are you familiar, Doctor, with operation of this particular shotgun?

A No, I never fired a shotgun.

Q You never did?

MR. GRIBETZ: I would ask Mr. Stewart who is in the courtroom to demonstrate for you. We had earlier a demonstration of the operation of this shotgun and I would ask Mr. Stewart with his honor's permission, because the witness is testifying concerning useage of the weapon that he not seen operated. If your honor would permit it, fine. If not I will withdraw the question.

THE COURT: I don't think it is necessary for him. You have to pull it back and then discharge one shell and put another one in the chamber. It takes that action between shots. You can't go bang, bang.

THE WITNESS: Right.

Q So it is correct are you now aware that you can't use this weapon simply by pulling the trigger? You have to pump it?

A Yes.

Q If you want to fire a single shot you have to pump, eject the cartridge and fire a second time and pull the trigger?

A I understand.

Q Is it correct to fire this weapon one must not only hold the weapon but there are two physical acts; pumping and pulling of the trigger?

A All right.

Q And to fire a second time one must pump it and pull the trigger?

A Right.

Q Will you agree with me those are four biological acts that a person must do to fire that weapon twice?

A Well four movements, is that what you mean by a biological act?

Q Four acts of the human body?

A Right.

Q Would it be correct that if these two individuals were in two different locations in the room the person would also have to commit the biological act of pointing the weapon at that second individual?

A Yes, if they were indeed in two different locations.

Q Did Mr. Mellion show you the ballistic report of this?

A He alluded to it, but I didn't see the report itself.

Q How did he allude to it?

A It is my understanding from Mr. Damiani and Mr. Mellion that two casings, there are two cartridges were found at the scene of the homicides. And, therefore, it is indisputable or seems undisputable that the weapon was twice discharged. I don't recall hearing other data than those.

Q Would it be undisputable if there were two shots that were fired from this weapon which is People's exhibit 5 and that caused the death of these two separate individuals?

A It seems clear.

THE COURT: This witness has no first-hand knowledge.

Q It is also indicated in the ballistics report that there were numerous portions a witness testified to that, there were numerous portions of broken stock of shotguns found within the room itself?

A Yes, I know that. I heard that, right.

Q And you are aware also are you not, based on what I just read to you that there was also a fractured skull that Wendy Beam suffered which contributed to her death?

A I didn't know that. There was much evidence to the affect they had been battered both of them prior to the shotgun injury they incurred.

Q Wouldn't that indicate to you if the victims had been battered, the victims had been shot in the head, these were different physical acts that were inflicted upon their body?

A Physical acts? I suppose you can put it into that mold of language if you chose. It seems to me it was a frenzied assault. That's what I would characterize. It was the component of assault. If you want to use the term act in the solely mechanical sense it is okay. That's one way to use the word act. I would spontaneously describe it as a frenzied assault, blind, unrelenting, disasterous assault. That's the way I would characterize it.

Q During this unrelenting assault you don't know how long it lasted, do you?

A No, I don't. I think it must have been very brief otherwise some sort of intervention would have been performed by the victims, by one of the women I think. But I admit that is conjecture.

Q Could you explain that?

A If either had had more than a bit of time to intervene in some way they probably would have. My preception that desperate and seeing what was going on, if they had had a chance and weren't swept down.

Q If they weren't killed?

A Overwhelmed.

Q By the brutality of Herbert Scandell?

A Overwhelmed by homicidal assault one would have been able to probably do something. That's based on my military experience.

A Are you saying that if their heads weren't being battered and if Herbert didn't have a shotgun that he was pointing at them they could have done something?

A I say it must have been a very rapid volley of components of assault, otherwise probably one of the desperate two women, and they must have been desperate, could probably have intervened in some way.

Q That doesn't make sense to me.

A It is obvious common sense.

Q Common sense? How big is Mr. Scandell?

A He's about 6 - 2.

Q How much does he weigh?

A 220.

Q Were these women armed when they came in that room?

A Not to my knowledge.

Q What was he holding in his hands? What did he grab when these women came in the room?

A That isn't the way he went in the room.

Q When he went in the room did he grab a shotgun?

A No.

Q How long afterwards?

A None of us know, counselor, but his story. I'd find it not incredible that an argument started and in the course of that argument as his wife repeatedly refused to tell him where his child was, in spite of his demand, to use his own than words, he started getting a little mad at that point. He grabbed the first weapon and starting pushing them.

Q Would it be reasonable to believe that he battered their skulls with a blunt object during the course of this frenzy?

A That's already pretty clear.

Q And their skulls were battered?

A Sure.

Q Would it be correct to say that he utilized the shotgun by shooting Wendy Beam and also secondly or firstly shooting Melanie Scandell?

A That's obvious, sure.

Q These were different acts that were committed during the course of this incident?

A Yes. I am saying it was a blizzard of acts because I do believe, counselor, based upon my war experience in the military if it hadn't been a blizzard of acts that perhaps at least one of the two women would have intervened.

Q I understand what you are saying. I don't understand how you believe that two unarmed women would have made an intervention against this defendant even if it wasn't a very short period of time.

THE COURT: If he shot one woman that seems to be the evidence from his own statement that he gave to the district attorney. He shot one woman and he still has the gun in his hands. And how does the smaller person second person how does she disarm him, assuming she is given 10 minutes?

THE WITNESS: I don't know exactly what happened, but by my experience with persons subjected to overwhelming homicidal assault that desperate energy in many cases comes to them and they do sometimes resist unless it has been a totally overwhelming blizzardous assault. I don't think there was much time between all these acts, that's all I am saying. It was an overwhelming assault.

Q It could have been moments. It could have been 60 seconds. It could have been two or three minutes, you don't know?

A I don't think it was two or three minutes, but we don't know. I'm telling you, counselor, again that I am basing my conjecture that it was very brief and overwhelming from part of my war experience.

Q Are you basing what took place at 29 Samsondale in West Haverstraw based on your personal war experience in Vietnam?

A I am utilizing my knowledge of what people can do when they are desperate to say that happened very quickly.

Q But again it would be correct to say, in all fairness, even though you have been retained by the defense, it would be a way out conjecture to base your war experience on what happened to two unarmed woman in an apartment in a room in Haverstraw, New York?

A I don't think it is way out at all. I don't believe it took a couple of minutes. I'd like to know if that evidence is in.

THE COURT: We don't have it. Anything further?

MR. GRIBETZ: I have no further questions.

MR. MELLION: Nothing further.

THE COURT: I want to ask you a couple of questions.

You were called upon and you made an evaluation that he acted under extreme emotional disturbance; that was the killing of both women?

THE WITNESS: Yes.

THE COURT: You had an option to find had you found it and I respect your opinion. I respect you and I have heard only wonderful things about you. And I am impressed. You never have been in my Court and I look forward to you coming back again. But you had the option to find him insane and you didn't find that he was perfectly normal.

You found he was acting under extreme emotional disturbance. You had a further option, insane.

THE WITNESS: I didn't have no option, not good evidence of being insane.

THE COURT: You do know as a forensic psychiatrist that if a person is found to be normal they would face a full murder charge if convicted by a jury?

THE WITNESS: Sure.

THE COURT: If they have a manslaughter with extreme emotional disturbance and they are insane they face nothing at all. They would go to a hospital?

THE WITNESS: Yes.

THE COURT: And you were thorough and you found extreme emotional disturbance?

THE WITNESS: Yes.

THE COURT: Fine. Thank you. We'll take a short recess.